The case of *re Huggins,* 21 Ch. D. 85 decides that pension of a retired judge of a Crown Colony, granted by the Secretary of State for the Colonies and voted annually, is property which vests in the trustee in Bankruptcy and is income of the bankrupt and consequently is available for the benefit of the creditors, notwithstanding that the pension could not be sued for or even made the subject of a petition of right because it was granted out of the voluntary bounty of the Crown.

Similarly in *re Hawkins,* [1926] Ch. 428. In this case the facts of which are analogous to the present case it was held that a death gratuity by the Board of Education under discretionary powers conferred by section 3 of the School Teachers Superannuation Act, 1918, to the legal personal representative of a teacher who died intestate, will be treated as forming part of the estate of the deceased and be primarily applicable in payment of the deceased's debts and ought not to be held upon trust for his next-of-kin.

In the case of *Hollinshed* v. *Haselton,* [1916] 1 A.C. 428 the House of Lords held that the allowance of £400 a year to the members of Parliament was a salary or income within the meaning of section 51 of the Bankruptcy Act and therefore available for creditors. In this case all the leading authorities bearing on the question in point were reviewed and purely voluntary allowances as in the case of *re Wicks, supra,* were distinguished from the pay and pensions of officers serving under the Crown.

I have dealt with this matter at some length for the reason that there appears to have been some conflict, locally, on the question, mainly attributable to the fact that the judgment of Shaw C.J. confirmed as it was by the Court of Appeal has not been reported* and apparently was lost sight of and not referred to in later cases. I am bound by that decision and it seems to me obvious that section 16 of the Pensions Ordinance, 1928 (and similarly 19(2) of the Municipal Ordinance) has been included in order to avoid the embarrassment that would be caused to the Government and Municipalities if pensions, gratuities and other allowances could be assigned or transferred before payment or that sums due as such could be attached, sequestered or levied before payment but I see no reason, as Shaw C.J. says why, after payment has been made to the recipient, such amounts should be protected either during lifetime, or after death, from being liable and being made available for debts incurred. To take an example, suppose a civil servant who has exercised the option to commute 1/4th of his pension retired and received £2,500 as the commuted portion of his pension which he invests in gilt edged securities. Is this amount protected against his creditors in the event of his bankruptcy? And even if he is made bankrupt during his service and is retiring in consequence thereof, and the gratuity is awarded, can it be said that such is not available for distribution amongst his creditors?

In my opinion section 16 of the Pensions Ordinance does not have that effect and was never intended to have such effect.

* See now p. 65, *supra.*

The Official Assignee will therefore have the declaration sought and his costs and the costs of Miss Hendricks will be paid out of the gratuity when received by him.

Order accordingly.

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[93] F.M.S. REPORTS [93]

RAUB RUBBER ESTATES LTD. v. CONTROLLER OF LABOUR

[A.C.J. (Cussen J.) November 28, 1935]
[Pahang Civil Appeal No. 1 of 1935]

Workmen's Compensation Enactment, 1929, s.3(i) — "Arising out of and in the course of the employment" — Drinking acid by mistake for quinine.

K. was a coolie employed on the appellant's estate. On the 2nd September, 1934, *K.* was ill with fever and went to the estate dispensary to obtain quinine. The dispensary, which consisted of a locked medicine cupboard in the factory, was in charge of the estate conductor, who, for convenience, used to employ an estate coolie to issue out medicine. It was the practice on the estate for coolies, when they required quinine for fever, to come to the factory, and be supplied by this coolie.

When *K.* went to the dispensary to obtain quinine there were bottles containing formic acid next to the bottle containing quinine in the medicine cupboard. By mistake *K.* was given a dose of formic acid instead of quinine and died in consequence thereof.

Held: that the accident arose out of and in the course of the workman's employment. At the time of the accident the workman was on his employer's premises and was doing something which he had a right to do.

St. Helen's Colliery Co., Ltd. v. *Hewitson,* [1924] A.C. 59 distinguished.

Storr for the appellant.

Not an appeal on question of facts; an appeal on a conclusion reached on a wrong view of the law. *Lancashire and Yorkshire Railway* v. *Highley,* [1917] A.C. 352, 369. *Willan* admits this.

First ground of appeal.

McNicholas v. *Dawson,* [1899] 1 Q.B. 773; *Hawkins* v. *Powell,* [1911] 1 K.B. 988, 995.

Second and third grounds of appeal.

† Deceased coolie was ill and went to get medicine. He was under no obligation to his employers to get medicine, so does not come within the test laid down in *Lancashire and Yorkshire Railway* v. *Highley, supra,* which is, "Was it part of the deceased person's employment to hazard, to suffer, or to do that which caused his death?" Deceased, even if under an obligation, by taking the medicine from a coolie instead of from the conductor was adding an additional risk. Deceased called Subha Rao out of the packing room. *Lancashire and Yorkshire Railway* v. *Highley, supra.* Facts in this case somewhat parallel to those in *St. Helen's Colliery Co. Ltd.* v. *Hewitson, supra.* The Court will follow the test laid down by the House of Lords in that case.

Finding of fact by the Commissioner that the taking of the medicine was voluntary and workman under no obligation or duty to take medicine from the estate dispensary. No evidence to support the finding that Subha Rao was instructed by Ranganaya-

kalu to give medicine. *Smith* v. *Lancashire and Yorkshire Railway,* [1899] 1 Q.B. 141, 143. Onus on applicant.

Taking of medicine voluntary, even if a duty he added a risk by taking it from a coolie instead of from the dispenser.

Fourth ground of appeal.

Leonard's evidence — check roll — Labour Code, section 67(i). Labourer is only employed while he is at work.

Fifth ground of appeal.

Evidence — no post-mortem — no analysis of contents of the medicine bottle.

The risk is an ordinary one of every day life — any one might go into a dispensary and get a wrong prescription. It cannot be said to be part of the employment to take medicine. The suggestion is absurd — similar to treating a coolie for stomach-ache with castor oil — bursting his appendix and in consequence being liable under the Enactment. The Enactment not meant to cover such cases.

Willan (Deputy Legal Adviser) for the respondent.

An Appeal Court has the right to disturb the finding of fact of a Commissioner, but it will not interfere with such finding if it is one to which the Commissioner could fairly come: *Carnaby* v. *S.S. "Bromsgrove"* (1921) 14 B.W.C.C. 84, 89; *Hutchinson* v. *M'Kinnon,* [1916] 1 A.C. 471, 475. The deceased workman was not a daily labourer — see Labour Code, 1923, section 56. Under section 162, Labour Code, 1923, employer bound to supply medicine and the deceased workman, at the time of the accident, was doing something which he had a right to do. Well settled law that the word "employment" in the Enactment is not confined to actual work: *Brice* v. *Edward Lloyd Ltd.,* [1909] 2 K.B. 804. The facts in *Hutchison* v. *M'Kinnon, supra,* approach nearest to the facts of the present case. In that case it is clear that if the ship had provided tins to be filled with water and placed in a particular position that case would have been decided in favour of the workman. *St. Helen's Colliery Co., Ltd.* v. *Hewitson, supra,* is distinguishable because in that case the accident did not take place on the employer's premises. No other sources of medicine reasonably available for the coolie, he must go to the estate dispensary and therefore accident arose out of employment: *Richards* v. *Morris,* [1915] 1 K.B. 221.

Cur. Adv. Vult.

Cussen J.: This is an appeal from the order of the Commissioner for Workmen's Compensation at Kuala Lipis, Pahang, awarding compensation under section 4(1)A(i) of the Workmen's Compensation Enactment, 1929, in respect of the death of a Tamil [94] labourer named [94] Kumaran employed by the appellant — the Raub Rubber Estates Limited.

The appeal is brought under the provisions of section 29 of the Enactment.

Under section 21(iii) of the Enactment the Controller of Labour, Federated Malay States, made the application to the Commissioner on behalf of the workman, and is the respondent in this appeal.

The grounds of appeal are:—

(1) that the learned Commissioner should have held that the onus of proving that the accident arose out of and in the course of the employment of the deceased was on the applicant and that such onus had not been discharged.

As regards this it is sufficient for me to state that it is of course not disputed that the onus in this respect is on the applicant for compensation, and I cannot find that the Commissioner has held otherwise.

The question whether that onus has been discharged is really the same question as is raised in grounds (2) and (3) in the Memorandum of Appeal whether the accident arose out of and in the course of the employment of the deceased.

Ground (4) is that at the time of the accident the deceased was not in the employ of the appellant.

Ground (5) is that there was no evidence that the death of the deceased was caused in the manner alleged; the supplying to him from the estate dispensary by mistake of formic acid instead of quinine.

The facts given in evidence are not in dispute; the question is whether the Commissioner's conclusions from the evidence are correct.

The relevant facts shortly are as follows:—

The deceased Kumaran was a Tamil coolie employed on Sungei Mas Estate (appellant's property) since 24th July, 1934.

On the morning of 2nd September, 1934, Kumaran was ill with fever and about 6 a.m. went to the "Dispensary" to obtain some quinine. The "Dispensary" is a locked medicine cupboard in the factory in charge of the estate conductor — Ranganayakalu. The conductor, for convenience, used to employ a man named Subha Rao, also an estate coolie, to issue the medicines to the coolies, and it was the practice on the estate for coolies, when they required quinine for fever, to come to the factory and be supplied by Subha Rao.

So, on the morning of the 2nd September Kumaran came to the factory, called Subha Rao, told him he was suffering from fever, and asked for medicine. Subha Rao unlocked the medicine cupboard — (he had the key) — and gave Kumaran a dose of quinine (as he thought) in a glass. Evidently besides the medicine bottles some bottles or jars of formic acid were kept in this cupboard, Kumaran drank the contents of the glass, and soon after doing so complained of a burning sensation in the throat and stomach.

The conductor was called from his bungalow, and brought Kumaran to the Government Hospital at Raub.

Kumaran was in a moribund state on admission and died within ten minutes.

I will deal first with the fifth ground of appeal, i.e. that there was no evidence that the liquid given to the deceased by Subha Rao was, in fact, a corrosive poison that caused the death of the deceased.

In my opinion there is ample evidence to support the finding that the death of Kumaran resulted from drinking formic acid supplied to him by Subha Rao in mistake for quinine. There is the evidence of Subha Rao that after drinking the medicine Kumaran complained of a burning sensation in throat and stomach. There is the evidence of Dr. Samuel who states that the estate conductor who brought Kumaran to the hospital told him that he had been given formic acid by mistake.

He states that the lips and tongue of Kumaran were burnt with some corrosive fluid, and he gives the cause of death as poisoning from some corrosive fluid.

The conductor in his evidence explains how the formic acid came to be where it was in the medicine cupboard.

The manager gave the O.C.P.D. the conductor's indent or order for the formic acid.

I pass now to the fourth ground of appeal, i.e. that at the time of the accident the deceased, Kumaran, was not in the employ of the appellant.

The argument for the appellant under this ground is based upon the contention that the deceased coolie was only a daily labourer and that he was not employed on that day (i.e. 2nd September) as no work was given to him. If the deceased was only a daily labourer that must mean that his employment was from day to day and terminable accordingly. I should be very surprised if the manager of the estate, Mr. Leonard, meant this when he said the deceased was "a daily labourer," and would agree that all his coolies could lawfully terminate their contract of employment and leave the estate on giving, if any, one day's notice.

However, it is quite clear from the provisions of sections 56, 57 and 58 of the Labour Code, 1923, that the deceased coolie, like all such coolies, was on a monthly agreement and so was in the employment of the appellant on the day of the accident.

I come to the remaining ground of appeal, which was argued at length and presents an important general question for decision. Did the accident, which caused the death of Kumaran, arise out of and in the course of his employment?

The argument relied upon by Mr. Storr for the appellant on this ground of appeal depends upon the application of the "tests" laid down by the House of
[95] Lords in the case of *St. Helen's* [95] *Colliery Co., Ltd.* v. *Hewitson,* [1924] A.C. 59.

He refers to the test of obligation or duty of the workman to his employer.

It is not sufficient that the workman was, at the time of the accident engaged in doing an act which he was allowed to do by his employer or even which he was entitled to do; it must be something which it was his duty to do for his employer.

It is contended that, if this test be applied, the present claim fails, for, on the evidence, it is not proved that the coolie Kumaran, in going to obtain and in taking the medicine, was doing something which he was bound to do by his contract of employment; there is nothing to show that he was under any obligation, or duty, express or implied, to do so.

On the contrary, it is claimed that the evidence of the manager, Mr. Leonard, establishes that there was no such obligation or duty of the coolie to his employer.

Mr. Leonard states:—

> "Medicines could be obtained from the Sungei Mas Dispensary but there was no compulsion in the matter. No instructions. It was entirely optional. It was not a term of the coolies employed that they should there obtain medicine. The normal procedure, as instructed by me, is for the coolie to obtain medicine from the conductor himself — at the coolie's own wish. The medicine was in charge of the conductor."

It is true that under section 162(f) of the Labour Code, 1923, the employer is bound to provide, for coolies living on the estate, a "sufficient supply of medicines of good quality."

But while this statutory provision places an obligation on the employer to have available to the labourer proper medical supplies, there is no corresponding obligation on the labourer to make use of them when he is ill. There is certainly no statutory obligation on the labourer; and, on the evidence recorded in this particular case, there is nothing to show that the labourer was, by any express, implied or customary term of his employment, under any duty to his employer to take these medicines so provided.

The conductor states in his evidence:—

> "If coolies have fever they take medicine about 6 a.m.; sometimes they came back from work to take medicine. Sometimes they came in from the lines to take medicine."

Mr. Leonard tells us, in effect, that the estate as employer does not expect or consider it in any way a duty on the coolies on the estate to come and protect or restore their health by making use of the common medicines such as quinine, and so be able and fit to carry on their work. If that is so one may visualise a position where possibly a large proportion of the labourers on the estate are ill with fever, unable to work, do not choose to take the medicine offered to them, and the employer must accept the position helplessly.

As the evidence stands, it must, I think, be held that, if this narrow test of what is a duty to the employer arising out of the contract of employment is to decide the question, then the death of Kumaran cannot be said to be due to accident arising out of and in the course of his employment.

But indeed this test of obligation to the employer is only strictly applicable when, at the time of the accident, the workman is not on his employer's premises.

The case of *Anderson* v. *H. Hickman & Co., Ltd.*, (1928) 21 B.W.C.C. 369 and the cases referred to in the judgments therein show this, when the test of obligation was held not to apply when the accident happens on the premises of the employer.

Sankey L.J. in his judgment (p. 374) says:—

"I agree there are two lines of cases which are applicable and the determination of each case depends on which side of the line it comes under. Where the workman has not arrived at his employer's premises or has left them he must show he was under an obligation to his employer to be where he was at the time of the accident. Where the accident happens on the employer's premises he must then show he was travelling on or by a permitted road."

It cannot be said that when Kumaran went to the dispensary on the estate and then took the medicine that he was not doing something he was permitted to do. In fact he was doing something which he was not only permitted to do, but which he had a right to do.

But the judgments in the same case, i.e. *St. Helen's Colliery* v. *Hewitson, supra,* indicate an alternative "test" which may be applied.

Although there may be no binding contractual obligation on the workman to do the act, it is sufficient if it is reasonably necessary for him to do it.

Obligation and necessity are the two tests.

Lord Buckmaster in his judgment says:—

"I think it would be wrong having regard to the purpose of the statute.....to narrow the meaning of the words used; they are general words intended, as I regard them, for a wide and general application; but I find myself unable so to construe them as to include in their operation the right of travelling by a train which the workman was under no obligation and no proved necessity to use."

Lord Atkinson says:—

"It must be borne in mind that if the physical features of the locality be such that the means of transit offered by the employer are the only means of transit available..... there may be an implied term [96] that there was an obligation on the employer to provide such means and a reciprocal obligation on the workman to avail himself of them,"

and again:—

"In my view the evidence in this case does not establish that the Colliery Company was bound to provide these trains for their workmen. Nor that the workmen were on their side bound to travel to their work by these trains; nor yet that there were no other means reasonably available by which they could travel to their work."

Now in this present case the employer was bound by law to provide the labourer with sufficient medicines of good quality. Allowing that the labourer was not bound to use them, can it also be said that there were other sources reasonably available for him to obtain medicine of good quality?

What is the Tamil labourer on an estate, ill with fever, to do; how is he to obtain the quinine he needs: is he to leave the estate and wander away seeking the nearest shop, village, or town, where he may be able to purchase a supply of quinine?

It may be that, owing to the attack of fever, he is physically too weak to undertake such an expedition; it may very well be all he can do to go from his lines to the dispensary.

It is clear to me that it cannot be said that, in such circumstances, there are other means reasonably available.

But it is said — granted that there is no other reasonably available source of supply — still it is not necessary that the labourer shall take the medicine.

I cannot see that, if a labourer is to maintain himself in a fit state to do his work, it is not as necessary for him to have medicine if attacked by fever as it is for him to have food, drink, and shelter.

Section 162 of the Labour Code places a supply of medicines on the same basis as proper house accommodation and a wholesome water supply.

If a coolie is asleep in his room in the estate lines and the roof, or the wall, falls down and, injures him, does his case not come under the Enactment?

The health and physical well being of his labourers are matters which directly concern the employer in his own interest if the work of the estate is to be carried on; the law prescribes what he must do in relation to such matters: and, when the labourer acts in accordance therewith, I fail to see how it can be said that what he is doing does not arise out of and in the course of his employment.

The Commissioner in his judgment holds that "the taking of the medicine though voluntary, was one of the ordinary incidents of the life of an estate workman and incidental to employment on that estate."

It is also argued for the appellant that there is an added peril by reason of the labourer having taken the medicine from Subha Rao instead of from the conductor. The answer is that this was not the act of the labourer; it was the established practice on the estate for Subha Rao to give out quinine to the coolies; the conductor, who is a responsible employee and placed by the manager in charge of the medicines, authorised Subha Rao to do so. This is clear from the evidence of Subha Rao and the conductor. One wonders what would have happened if the labourer said to Subha Rao, "I will not take the quinine from you — go to the bungalow and call the conductor to come and give it to me."

I will conclude by quoting from the judgments of Lord Carson and of Lord Shaw in the case of *St. Helen's Colliery* v. *Hewitson, supra.*

Lord Carson says:—

"I would like to add this, that, ambiguous as the words of the Statute are, I doubt if the authorities give any great assistance in elucidating them; nor do I feel certain that any definition can be framed, apart from the particular facts of each case, which will be found helpful to solve the meaning of the Statute,"

and Lord Shaw remarks:—

"A few general principles may, however, emerge from this mass of authority; and, above all, the language of the Statute must still be allowed to speak for itself."

In the abstraction of general tests from particular decided cases there is always a danger that the scope of the law may be unduly narrowed and restricted.

I find, therefore, that the decision of the Commissioner is correct.

The appeal is dismissed. By agreement no costs.

Appeal dismissed.